No. 91-372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF GEORGIA,

Petitioner,

vs.

THOMAS MCCOLLUM, WILLIAM JOSEPH MCCOLLUM, and ELLA HAMPTON MCCOLLUM,

Respondents.

On Writ of Certiorari to the Georgia Supreme Court

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Are criminal defendants to be the only litigants granted immunity from the prohibition against racially discriminatory peremptory challenges enunciated in *Batson* v. *Kentucky*, 476 U. S. 79 (1986)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Statutes

State Statute

Treatises

Miscellaneous

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INTEREST OF AMICUS

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation. CJLF seeks to further the interests of victims of crime in the criminal justice system. Specifically, CJLF seeks a recognition that victims as well as defendants are entitled to fundamental fairness and equal protection of the law.

The present case involves the issue as to whether criminal defendants are the only litigants immune from the prohibition

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1. CJLF has received written consent of the parties to file this brief.

against racially discriminatory peremptory challenges announced in *Batson* v. *Kentucky*, 476 U. S. 79 (1986). CJLF contends defendants are subject to *Batson*.

Giving criminal defendants the freedom to racially discriminate against jurors would undermine the integrity of verdicts and respect for the justice system. Because this may have a substantial adverse impact on the victims whose interests CJLF was formed to represent, CJLF has a substantial interest in the case.

SUMMARY OF FACTS AND CASE

Defendants, who are white, were indicted for various assault-based crimes against the victims, who are black. The prosecution filed a pretrial motion to prohibit defendants from exercising racially discriminatory peremptory challenges. Pet. Cert. 2-3. The trial court denied the motion, and the Georgia Supreme Court affirmed, holding that *Batson* did not apply to defense. *Id*., at 3; see *State* v. *McCollum*, 405 S. E. 2d 688, 689 (Ga. 1991).

SUMMARY OF ARGUMENT

Making defense peremptory challenges subject to *Batson* v. *Kentucky*, 476 U. S. 79 (1986) is the logical continuation of this Court's jury discrimination jurisprudence. This Court has consistently opposed jury discrimination in any form. Prohibiting jury discrimination by the criminal defense will close the last unregulated bastion of jury discrimination.

Making defendants immune from *Batson* would be unfair to the prosecution. Subjecting the prosecution but not defendant to *Batson* would give the accused an unwarranted and ultimately unfair advantage in shaping the jury. A proper jury trial is not biased against *either* side. As justice is also due to the accuser, defendants should be as constrained by *Batson* as the People.

Defense jury discrimination harms two substantial constitutional interests. The excluded juror has an equal protection right not to be excluded from the jury for reasons of race. Discriminatory defense peremptories deprive the excluded juror of this important civil right.

The public is also harmed by defendants' discrimination. Jury discrimination, regardless of which side causes it, destroys the public's faith in the jury, creates disrespect for verdicts, and thus undermines the legal system. Such a loss of faith can have disastrous consequences.

Peremptory challenges involve a critical transfer of power from the government to the litigants; without the transfer, a criminal defendant cannot exclude a juror for reasons of race. Defendants' dependence upon the state for this power thus transforms his exercise of the peremptory challenge into state action for the purpose of the Fourteenth Amendment. As the excluded jurors are unlikely to raise their right not to be excluded, and, as the prosecution has a strong interest in preventing jury discrimination, the prosecution has third party standing to raise the juror's claim.

Criminal defendants are not entitled to a special exemption from the *Batson* rule. There is no right to a peremptory challenge under the Sixth Amendment. Immunizing the defense from *Batson* would be a perversion of due process principles. Finally, subjecting defense peremptories to *Batson* will not eliminate them.

ARGUMENT

I. *Batson* applies to criminal defendants.

With *Strauder* v. *West Virginia*, 100 U. S. 303 (1880) this Court started a struggle against one of the bulwarks of racial oppression—jury discrimination. The struggle continues unabated today. See *Powers* v. *Ohio*, 113 L. Ed. 2d 411, 419, 111 S. Ct. 1364, 1366 (1991). Because the jury is such an important part of our civic structure, racial discrimination is

particularly destructive when it infects the jury. Therefore, this Court's vigilance against jury discrimination is particularly important in making good the Fourteenth Amendment's promise of full civil and political rights for all, regardless of race. See *Strauder*, *supra*, 100 U. S., at 306-307.

The jury is one of the oldest and greatest entitlements of Anglo-American law. See *Duncan* v. *Louisiana*, 391 U. S. 145, 151 (1968); 4 W. Blackstone, *Commentaries on the Laws of England* 407 (1st ed. 1769). It is both a check on the state's power, see 4 Blackstone, *supra*, at 343-344, and a badge of citizenship, see *Powers*, *supra*, 113 L. Ed. 2d, at 424, 111 S. Ct., at 1369. Excluding a person from a jury for racial reasons is an "assertion of . . . their inferiority" against the excluded juror. *Strauder*, *supra*, 100 U. S., at 308.

Since *Strauder*, this Court has displayed unequivocal hostility to racial exclusion from jury service. It has forbidden legislative and judicial discrimination, see *id*., at 305; *Ex parte Virginia*, 100 U. S. 339, 346-347 (1880); discrimination in the selection of both grand and petit juries, *Hill* v. *Texas*, 316 U. S. 400, 404 (1942); *Avery* v. *Georgia*, 345 U. S. 559, 561 (1953); discrimination in civil and criminal juries, see *Strauder*, *supra*; *Thiel* v. *Southern Pacific*, 328 U. S. 217, 220 (1946); and discriminatory peremptory challenges, *Batson* v. *Kentucky*, 476 U. S. 79, 96 (1986).

This case presents the last bastion of jury discrimination. This Court has not directly addressed defendants' use of discriminatory peremptories. See *id*., at 89, n. 12. This case can drive the last nail into jury discrimination's coffin.

A. Fairness

Since this Court addressed the issue of discriminatory peremptory challenges in *Batson*, it has examined almost every significant factual setting in this field. It has forbidden discriminatory peremptory challenges by the prosecution, whether the defendant and the juror are of the same race, *Batson*, *supra*, or of different races, *Powers* v. *Ohio*, 113 L. Ed. 2d 411, 419, 111 S. Ct. 1364, 1366 (1991). It has forbidden discriminatory challenges by civil litigants. *Edmonson* v. *Leesville Concrete Co.*, 114 L. Ed. 2d 660, 680, 111 S. Ct. 2077, 2089 (1991). Only criminal defense peremptories have not been analyzed. See *Batson*, *supra*, 476 U. S., at 89, n. 12. The Georgia Supreme Court held that criminal defendants were not subject to *Batson*. Pet. Cert. App. 3. Fairness dictates otherwise. If every other litigant in every other factual setting is subject to *Batson*, there is no reason to immunize criminal defendants.

The greatest harm that may befall our jury system is bias, whether actual or apparent. It destroys the public's faith in the justice of verdicts, ruining the credibility of the system. See *Batson*, *supra*, 476 U. S., at 87. Given the great resources of the state and the inclination of most people to favor the prosecution, this Court justly focuses its energy on preventing the prosecution from improperly influencing the jury in its favor. See, *e.g.*, *id*., at 89, n. 12; *Swain* v. *Alabama*, 380 U. S. 202 (1965). Yet for the jury to be *unbiased* it can favor neither the prosecution nor the defense.

> "But to prescribe whatever will tend to secure the impartiality of jurors in criminal cases is not only within the competency of the legislature, but is among its highest duties. It is to be remembered that such impartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. *Between him and the state the scales are to be evenly held*." *Hayes* v. *Missouri*, 120 U. S. 68, 70 (1887) (emphasis added).

The peremptory challenge is intended to remove bias against either side, thus insuring an impartial jury. See *Holland* v. *Illinois*, 107 L. Ed. 2d 905, 916, 110 S. Ct. 803, 807 (1990). Granting defendants' request to be free from *Batson* would create an imbalance between the prosecution and defendants in their ability to influence jury selection. This is contrary to the reasoning behind the peremptory challenge. Allowing defendants to have an advantage in shaping the jury runs contrary to the design of most jurisdictions to grant the prosecution and defense equal power over the jury's composition. See 2 W. LaFave, *Criminal Procedure* § 21.3, at 736

(1984).

"A person's race simply 'is unrelated to his fitness as a juror.' " *Batson*, *supra*, 476 U. S., at 87 (quoting *Thiel*, *supra*, 328 U. S., at 227 (Frankfurter, J., dissenting)). Just as the prosecution's use of race-based peremptories destroys defendants' interest in a fair trial, *Batson*, *supra*, at 86-87, a defendant's use of the same tactic is unfair to the prosecution. *Batson* was part of this "Court's unceasing efforts to eradicate racial discrimination" from the jury. *Id.*, at 85. It is not a license for defendants to bias the jury in their favor. "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (1934). Exempting criminal defendants from the *Batson* rule would be contrary to the purpose of the peremptory challenge.

B. Rights Other Than Defendants'.

1. The juror's right.

The people of Georgia are not the only ones unfairly treated by the state court's decision. The wrongly excluded juror is a victim whose rights are recognized by both the Equal Protection Clause, see *Powers* v. *Ohio*, 113 L. Ed. 2d 411, 424, 111 S. Ct. 1364, 1370 (1991), and an act of Congress, see 18 U. S. C. § 243. The sting of racism, whether from the prosecution or the defense, is the same to the excluded juror. The fairness due to the prosecution, see *Hayes* v. *Missouri*, 120 U. S. 68, 70 (1887), is just as due to the juror. Allowing one particular set of litigants to exclude jurors for racially motivated reasons contradicts the spirit of this Court's entire line of jury discrimination decisions.

Although the prohibition against jury discrimination started as a means to protect the criminal defendant's equal protection interest in a fair trial, see *Strauder* v. *West Virginia*, 100 U. S. 303, 309 (1880), this Court has always recognized the excluded juror as a party directly harmed by the discrimination. *Strauder* itself noted that singling out one race as being presumptively unfit for jury service was a brand of inferiority upon them and a stimulant to racial prejudice. *Id.*, at 308. Singling a juror out due to race is no less harmful when done by defendant. Just as if the prosecution did the deed, defendant says to the challenged juror "because of your race you cannot be trusted, you are unfit to make one of the most important decisions in civil society." It is contrary to the postulates behind the Equal Protection Clause to assume that there is no stigma attached to being excluded from a jury due to skin color. See *Powers* v. *Ohio*, 113 L. Ed. 2d 411, 424, 111 S. Ct. 1364, 1370 (1991).

Powers demonstrated the strength of the juror's equal protection right in the area of peremptory challenges.[2] In *Batson*, there was no need to test the strength of the juror's right, because defendant and the excluded juror were of the same race. As the defendant was not of the same race as the excluded juror in *Powers*, the juror's claim had to stand alone. This Court confirmed the juror's right to be free from jury discrimination. It recognized the importance of jury service to the juror:

> " 'The institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with direction of society.
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> " ' . . . The jury . . . invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism

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2. In a case decided before *Batson*, the juror's right to protection from other forms of jury discrimination was recognized in *Carter* v. *Jury Commission of Greene County*, 396 U. S. 320, 338 (1976).

which is the rust of society.

* * *

> " 'I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ.' " 113 L. Ed. 2d, at 422, 111 S. Ct., at 1368 (quoting 1 A. De Tocqueville, *Democracy in America* 334-337 (Shocken 1st ed. 1961)).

As the discriminatory peremptory challenge deprived the excluded juror of "a significant opportunity to participate in civic life," jurors have a right not to be excluded from the jury for racial reasons. 113 L. Ed. 2d, at 424, 111 S. Ct., at 1370.

This Court's most recent application of *Batson* reaffirmed the strength of the juror's right not to be excluded. In *Edmonson* v. *Leesville Concrete Co.*, 114 L. Ed. 2d 660, 111 S. Ct. 2077 (1991), this right formed the foundation for extending *Batson* to the civil trial. The illegality of discriminatory civil peremptories was not based upon any right of the litigants. Instead, the *Edmonson* Court again relied upon the juror's right not to be excluded and allowed the opposing litigant to raise this right against a discriminatory peremptory challenge. 114 L. Ed. 2d, at 679, 111 S. Ct., at 2087. As in *Powers*, the interests of the litigants were subordinate, what mattered most were the victims of the discrimination: the excluded jurors.

Powers and *Edmonson* demonstrate the importance of the juror's right to not be discriminated against. While in many instances the criminal defendant will be harmed by jury discrimination, see *e.g.*, *Strauder*, *supra*, 100 U. S., at 309, any analysis of jury discrimination must also focus upon the excluded juror.

In recognizing this principle, the *Powers* and *Edmonson* Courts equate good law with good sense. The excluded juror receives the most direct taint of bias in a jury discrimination

case. He is accused of being racially tainted. Only the juror is deprived of a civic privilege because of *his* race. Excluding jurors due to race:

> "is practically a brand upon them, affixed by the law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Strauder*, *supra*, 100 U. S., at 308.

Focusing on the juror places the law of jury discrimination within the mainstream of equal protection law. Equal protection's "primary concern [is] the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States" due to race. *Shelley* v. *Kraemer*, 334 U. S. 1, 23 (1948). The notion that the Fourteenth Amendment was designed to secure full civil and political rights for the racially oppressed goes back to the beginnings of the Amendment, see *Strauder*, *supra*, 100 U. S., at 306-307, and is as important today, see *Rose* v. *Mitchell*, 443 U. S. 545, 554-555 (1979).

This is not meant to ignore the harm jury discrimination does to the litigant. Jury discrimination denies equal protection to the litigant by denying him the protection against arbitrary justice guaranteed by a jury of one's peers. Cf. *Batson*, *supra*, 476 U. S., at 86. The juror's rights, however, must still be protected under equal protection and thus remain key to the *Batson* line of cases, as demonstrated by *Powers* and *Edmonson*.

Congress has also recognized the importance of the juror's rights. Federal jury discrimination law does not look to the aggrieved litigant, but instead seeks to protect the excluded juror.

> "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, col-

> or, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause shall be fined not more than $5,000." 18 U. S. C. § 243.

The statute does not speak in terms of the litigant's rights. It prevents the "citizen" from being disqualified for racial reasons. This underscores the juror's right not to be excluded. See *Peters* v. *Kiff*, 407 U. S. 493, 507 (1972) (White, J., concurring). Thus, both the will of Congress and decisions of this Court demonstrate that when deciding whether to remove the criminal defendant from *Batson*, this Court should look to the excluded juror before addressing defendants' claims.

2. Public interest.

It is not only proper to apply *Batson* to defense peremptories, it is also necessary to do so. Important constitutional interests are at stake, and immunizing defendant from *Batson* would sacrifice these interests for no sufficient reason.

For most people, the most direct sustained exposure they have to the judicial system is through jury service. "Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers* v. *Ohio*, 113 L. Ed. 2d 411, 423, 111 S. Ct. 1364, 1369 (1991). While serving as a member of a jury, a citizen will be able to observe firsthand how a trial works, make key, usually unreviewable factual determinations, and apply the law to the facts that decide the fate of the litigants. "Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life." 113 L. Ed. 2d, at 419, 111 S. Ct., at 1366.

The jury thus has its place as one of our most important civic institutions. Its roots are ancient, running back to the earliest Saxon colonies in Britain. See 3 W. Blackstone, *Commentaries on the Laws of England* 349 (1st ed. 1768). The accused was not the only one protected by the jury, however.

Society had a strong stake in having facts determined by an impartial jury drawn from the citizenry. If judges were allowed to determine the facts, our ancestors felt that they would "have frequently an involuntary bias towards those of their own rank and dignity: it is not to be expected from human nature, that *the few* should always be attentive to the interests and good of *the many*." *Id.*, *supra*, at 379 (emphasis in original). A jury drawn from the public would protect society from the powerful. The jury "preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachment of powerful and wealthy citizens." *Id.*, at 380.

This Court continues the common law's respect for the unbiased jury. Of course, the jury exists as a bulwark to protect criminal defendants from arbitrary prosecution and capricious judges. See *Duncan* v. *Louisiana*, 391 U. S. 145, 146 (1968). But the community has an added interest in the jury. It is a democratic institution that all citizens should be allowed to participate in, regardless of group affiliation. It "preserves the democratic element of the law, as it guards the rights of the parties and insures continued acceptance of the laws by all of the people." *Powers*, *supra*, 113 L. Ed. 2d, at 423, 111 S. Ct., at 1369.

> "This [democratic] element is vital to the effective administration of criminal justice not only in safeguarding the rights of the accused, but in encouraging popular acceptance of the laws and the necessary general acquiescence in their application. It can hardly be denied that trial by jury removes a great burden from the shoulders of the judiciary. Martyrdom does not come easily to a man who has been found guilty as charged by twelve of his neighbors and fellow citizens." *Green* v. *United States*, 356 U. S. 165, 215-216 (1958) (Black, J., dissenting).

Discriminatory exclusion "contravenes the very idea of a jury—'a body truly representative of the community,' . . . . " *Carter* v. *Jury Commission of Greene County*, 396 U. S. 320, 330 (1970) (quoting *Strauder* v. *West Virginia*, 100 U. S. 303,

308 (1880)). The harm caused by jury discrimination "is not limited to the defendant, there is injury to the jury system, to the law as an institution, to the community at large—and to the democratic ideal reflected in the processes of our courts." *Ballard* v. *United States*, 329 U. S. 187, 195 (1946). The harm to the system occurs because jury discrimination "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." *Rose* v. *Mitchell*, 443 U. S. 545, 555-556 (1979). It thus "impairs the confidence of the public in the administration of justice." *Id.*, at 556. This harm was recognized by the *Batson* Court and integrated into its holding. See *Batson* v. *Kentucky*, 476 U. S. 79, 87 (1986).

These condemnations of jury discrimination were made in the context of discrimination by the state. Although challenges made by the prosecution have dominated the attention of the courts and commentators, see, *e.g.*, *Batson v. Kentucky*, 476 U. S. 79, 89, n. 12 (1986); *Swain v. Alabama*, 380 U. S. 202 (1965); Note, *Rethinking Limitations on the Peremptory Challenge*, 85 Colum. L. Rev. 1357 (1985), given the proper circumstances, the defense can also be motivated to make racially motivated peremptory challenges. See, Note, *Discrimination by the Defense: Peremptory Challenges After Batson v. Kentucky*, 88 Colum. L. Rev. 355, 364-365 (1988); P. Di Perna, *Juries on Trial: Face of American Justice* 152 (1984).

This problem was recognized by Justice Marshall in his concurrence in *Batson*. "The potential for racial prejudice, further, inheres in the defendant's challenge as well." *Batson*, 476 U. S., at 108 (Marshall, J., concurring). If defendant is accused of committing a racially motivated crime, counsel might consider it important to peremptorily challenge every venire member who is of the same race as the victim. One example is the racially charged "Howard Beach" case. In this case, four white teen-agers were charged with the killing of a black man in the Queens, New York, neighborhood of Howard Beach. The trial court, in response to the prosecutor's contention that the defense had used peremptory challenges to exclude three prospective jurors because they were black, required the defense to justify further challenges, citing *Batson*. The intermediate appellate court affirmed. *People* v. *Kern*, 545 N. Y. S. 2d 4, 34 (1989). The Court of Appeals affirmed based on the state constitution. *People* v. *Kern*, 554 N. E. 2d 1235, 1236 (N.Y. 1990).

A chilling example of the defense use of peremptory challenges is the case of Arthur McDuffie. McDuffie was a 33-year-old black insurance salesman, with no prior criminal record, who died from head injuries received from the police while being arrested for running a red light. P. Di Perna, *Juries on Trial: Face of American Justice* 179 (1984). The defense used its peremptory challenges to guarantee an all white jury. After hearing six weeks of testimony, the jury took only two and a half hours to return a not guilty verdict. *Ibid.* In the ensuing riot:

> "Blacks ran through the streets chanting 'McDuffie! McDuffie!' and 'Where is justice for the black man in America?' Cars were overturned at the state building. More whites were beaten. The verdict had hit the tense community like gasoline on a flame, because it was perceived as an all-white cover-up. In the end, the riots left sixteen dead, several hundred injured, and approximately $100 million in damages." *Id.*, at 179-80.

The McDuffie case illustrates that society has a compelling interest in assuring that all parts of the community can be represented on juries. This means that neither the defense nor the prosecution should be permitted to use peremptory challenges to racially bias the jury.

> "Selection which is or even appears to be discriminatory obviously destroys confidence and support among those against whom the discrimination seems aimed. And, seeing justice manipulated in their favor, the dominant group itself may suffer a breakdown in morality and an increase in lawlessness. This is illustrated in the extreme by the impunity with which racial and civil rights crimes have been committed in the South." Kuhn, *Jury Discrimination: The Next Phase*, 41 S. Cal. L. Rev. 235, 246 (1968) (footnote omitted).

Peremptory challenges make a jury less representative and more homogeneous, as each side eliminates those who are thought to be hostile to its interests. J. Van Dyke, *Jury Selection Procedures* 168 (1977). Thus both the prosecution *and* the defense must be prevented from having their assumptions regarding group bias reflected in the final composition of the petit jury if the goals of *Batson* are to be achieved.

C. State Action.

State action is rarely an issue in constitutional criminal procedure. The prosecutor, police officer, judge, or legislature scrutinized in the typical criminal case is clearly a state actor. With the exception of searches by private individuals, see, *e.g.*, *Burdeau* v. *McDowell*, 256 U. S. 465 (1921), there is little authority on state action in criminal cases. While the state actor in criminal cases is almost always one of the traditional agents of the state, this does not limit state action to these sources. In the proper context, even the traditional foe of the state, counsel for the criminal defendant, can be a state actor. The peremptory challenge provides the context to find state action. What is necessary to keep in mind is that the act can be as important as the actor in determining state action. The peremptory challenge is such an act, transforming the traditional opponent of the state into a state actor.

"Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color' of state law." *United States* v. *Classic*, 313 U. S. 299, 326 (1941). Ultimately, state action is a question of power: did the State lend power to the wrongdoer that allowed him to perpetuate his evil? The State does not have to discriminate itself; it only needs to use its power to allow the discrimination to happen. Thus, in *Shelley* v. *Kraemer*, 334 U. S. 1, 11 (1948), the fact that the only overt discrimination was committed by private parties was irrelevant. What mattered was that "but for the active intervention of the state courts" the discrimination would not have happened. *Id.*, at 19. This "active intervention" was the state court's enforcement of a racially restrictive covenant

made by private parties. As the covenant had no power to discriminate without the enforcement of the state court, the private source of the discrimination is irrelevant. "The difference between judicial enforcement and non-enforcement" of the private acts was the difference between whether the victims were or were not discriminated against. *Id.*

The present case is an even stronger example of state action. The discrimination in *Shelley* involved typically private conduct, the creation of a restrictive covenant. The discriminatory peremptory challenge comes up in the context of a traditional government function. As in *Shelley*, the challenge is meaningless without government sanction. As the discrimination is impossible without state help, the discriminatory challenge constitutes state action.

The "Jaybird Party" case is another demonstration of how a putatively private act becomes state action when the state provides the authority necessary to achieve the discriminatory goal. In *Terry* v. *Adams*, 345 U. S. 461 (1953), this Court, under the Fifteenth Amendment,[3] invalidated the discriminatory practices of the Jaybird Party. The Jaybird Party was a private club in Texas made up of all white registered voters in the state. They would hold elections several months before the Democratic primary. The winner of the Jaybird election would then run unopposed in the Democratic primary, which was tantamount to winning the general election. *Id.*, at 464 (lead opn. of Black, J.). The purpose of this scheme was to deprive blacks of any meaningful voice in Texas elections. *Id.*, at 463-464.

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3. Although the present case does not involve the Fifteenth Amendment, the Fifteenth Amendment also requires state action. Section one states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude." Therefore, the state action analysis in *Terry* applies with equal force to the Fourteenth Amendment state action requirement in the present case.

Although the state of Texas had no official involvement in the act of discrimination, limiting party membership to whites, this Court still found state action. The lead opinion, written by Justice Black, first looked to the overwhelming sentiment of Congress and the Constitution to eliminate racial discrimination from the right to vote. *Id.*, at 465-469. Even though the Jaybird Party was private, the effect of its election was to bring "into being exactly the kind of election that the Fifteenth Amendment seeks to prevent." This parallels the present case. *Batson* and *Powers* prevent the removal of jurors for racial reasons. Defendants, by opposing Georgia's *Batson* motion, seek the freedom to achieve the result made unconstitutional in *Batson* and *Powers*—the peremptory removal of jurors because of their race.[4] "When it [private action] produces the equivalent of the prohibited election, *the damage has been done*." *Id.*, at 469 (emphasis added).

Because the effect of the Jaybird election was to achieve discriminatory elections, the fact that Texas did not control the party did not matter. *Id.*, at 469. The Jaybird Party became "indeed the only effective part, of the elective process . . . ." *Ibid.* Their discriminatory exclusion of blacks from a traditional civic right became state action.

Justice Frankfurter, in his concurrence, looked to the transfer of power from Texas to the Jaybird Party. "The state, in these situations, must mean not private citizens but those clothed with the authority and the influence official position affords." *Id.*, at 473 (Frankfurter, J., concurring). This did not, however, require a complete transfer of the machinery of government. "The vital requirement is state responsibility—that somewhere, somehow, to some extent there be an infusion of conduct by officials, panoplied with State power, into any scheme by which" people are deprived of their rights because of their race. *Ibid.*

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4. The present case involves a pretrial motion. Therefore, defendants have not made any discriminatory peremptory challenges. Immunizing them from *Batson* will give them a green light to discriminate later in the case.

The present case is the result of such a transfer of power. The peremptory challenge cannot be exercised by a criminal defendant without a grant of power from the state. See *Stilson* v. *United States*, 250 U. S. 583, 586 (1919), accord, *Edmonson* v. *Leesville Concrete Co.*, 114 L. Ed. 2d 660, 673, 111 S. Ct. 2077, 2083 (1991). While defendant and counsel actually oppose the machinery of government, see *Terry*, *supra*, 345 U. S., at 474 (Frankfurter, J., concurring), they use the needed grant of government power to achieve a result forbidden by *Batson*.

In *Terry*, the Jaybird Party's participation with the government in the scheme to deprive blacks of their rights was enough to cloak them in with state action. See *id.*, at 476-477. While defense peremptories may not have the same taint of conspiracy, there still is a transfer of power that brings about a result which is unconstitutional when attributed to the state. Whether it comes about as a result of a conspiracy, as in *Terry*, or from racially-neutral enabling statutes, as in the present case, does not change the transfer of power or the discrimination arising from the transfer.

In *Smith* v. *Allwright*, 321 U. S. 649 (1944), an earlier "white primary" case, this Court held that the Democratic Party of Texas was a state actor when it allowed only whites to vote in its primary. The State Democratic Party was heavily regulated by and involved with the government with respect to primary and general elections. *Id.*, at 662-663. This turned the party into a state actor when it determined who voted in primaries. "The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party." *Id.*, at 663. As Texas set up the machinery for the primary system, and limited the choice in the general election to the winners of the primaries, it adopted the party's discrimination. *Id.*, at 664.

This also fits the present case. While the Democratic Party was much more an agent of the government than a criminal defendant, both needed the government to supply the power

to allow each to discriminate. The system of regulation making the primary so important to the general election, see *id.*, at 664, provided the party with the power that it otherwise would not have to make its exclusion effective.

Terry and *Smith* both demonstrate that when ostensibly private actors deprive people of a key democratic right, their action will be attributed to the state and thus subject to the restrictions of the Constitution. In each instance, some grant of government power was *necessary* to achieve the private party's discriminatory ends. Whether the grant took the form of favorable state regulation or cooperation from government officials does not change the private party's dependence upon the state.

Discriminatory peremptory challenges by defense counsel play a closely analogous role. Defendants need state power to make the challenges. The Legislature gives them the power. Defendants then deprive citizens of a key democratic privilege, jury membership, due to race. Cf. *Powers*, *supra*, 113 L. Ed. 2d, at, 424, 111 S. Ct., at 1369. There is no fundamental difference between the white primaries and the present case.[5]

Edmonson v. *Leesville Concrete Co.*, 114 L. Ed. 2d 660, 11 S. Ct. 2077 (1991) following the reasoning of *Shelley*, *Smith*, and *Terry*, eliminates any doubt that a peremptory challenge must constitute state action no matter which party exercises it. *Edmonson* dealt with a challenge made in a proceeding that supported the lowest level of government interest, an ordinary civil dispute between two private parties. 114 L. Ed. 2d, at

5. The fact that Texas encouraged the discrimination in *Terry* and *Smith* while the prosecution opposes any discrimination in the present case does not change the analysis. The prosecution is part of a tripartite system of government, the members of which are not supposed to act as one body. Cf. J. Madison, *The Federalist No. 47*, 301-307 (Rossiter ed. 1961). Here, the Georgia Legislature has provided defendants with the means to discriminate. Ga. Code § 15-12-165. While the Legislature did not intend for defendants to discriminate, this does not change defendants' reliance on the Legislature's grant of power.

670, 111 S. Ct., at 2080. The only connection the government had to this case was providing the forum and the procedure for resolving the litigants' dispute. In spite of the seemingly tangential relationship between the state and the litigants, the *Edmonson* Court held that a peremptory challenge made on behalf of a private civil litigant was state action.

The Court began its analysis with the most recent and comprehensive *Batson* case, *Powers* v. *Ohio*, 113 L. Ed. 2d 411, 111 S. Ct. 1364 (1991). *Powers*, along with *Batson*, was part of "over a century of jurisprudence dedicated to the elimination of race prejudice within the jury selection process." *Edmonson*, *supra*, 114 L. Ed. 2d, at 672, 111 S. Ct., 2081-2082. These cases, while concentrating upon criminal matters, did not sanction discrimination in civil proceedings. 114 L. Ed. 2d, at 672, 111 S. Ct., at 2082. Discrimination in civil proceedings was just as harmful as that in criminal cases. In each "race is the sole reason for denying the excluded venire-person the honor and privilege of participating in our system of justice." 114 L. Ed. 2d, at 672, 111 S. Ct., at 2081-2082.

As the harm was the same regardless of the type of proceeding involved, the analysis of state action was virtually the same. The *Edmonson* Court began with a framework taken from *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 939-942 (1982). First, the Court looked to "whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority." *Edmonson*, *supra*, 114 L. Ed. 2d, at 673, 111 S. Ct., at 2083. If the answer was yes, it would then ask "whether the private party charged with the deprivation could be described in all fairness as a state actor." 114 L. Ed. 2d, at 673, 111 S. Ct., at 2083.

The first part was clearly satisfied. Litigants are not entitled to peremptory challenges. They have "no significance outside a court of law" and exist only at the sufferance of the government. 114 L. Ed. 2d, at 673, 111 S. Ct., at 2083. The second part, whether civil peremptories were fairly attributable to the state, looked to three factors: 1) whether the act is a traditional function of government, 2) how much assistance the actor received from the government, and 3) whether the

injury is aggravated "by the incidents of government authority." 114 L. Ed. 2d, at 674, 111 S. Ct., at 2083. The first two factors were satisfied by the close relationship between the government and peremptory challenges. 114 L. Ed. 2d, at 674-676. The third factor, aggravation of harm, was satisfied because the challenge and the discrimination associated with it occurred within the courtroom, raising questions about the integrity of the judicial system and its democratic ideals. 114 L. Ed. 2d, at 678, 111 S. Ct., at 2087.

Edmonson compels a finding of state action in the present case. The difference between criminal defendants and civil litigants does not alter the analysis set forth in *Edmonson*. It does not change the dependence upon government. Criminal defendants have no constitutional right to peremptory challenges; the challenge is a privilege granted by government. See *Stilson* v. *United States*, 250 U. S. 583, 586 (1919). Nor does it change the aggravation of harm. The juror will still feel slighted, and the process will still be questioned regardless of who challenges the juror. Finally, the peremptory challenge is even more a traditional government function in criminal than civil cases. At the common law, peremptory challenges were not allowed in civil trials, they were only used for felony cases. See 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1st ed. 1769).

In finding state action, the *Edmonson* Court encountered only one minor obstacle. In *Polk County* v. *Dodson*, 454 U. S. 312, 314 (1981), a convicted criminal sued his public defender under 42 U. S. C. § 1983,[6] alleging that the public defender's

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6. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

representation of his case on appeal violated his civil rights. This confronted the Court with the issue of whether a public defender acts "under color of state law" when representing a criminal defendant. The *Dodson* Court concluded that the fact that a state paid for an attorney's services does not make it liable for his alleged incompetence. To be under color of state law, an actor had to be "exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *Id.*, at 317-318 (quoting *United States* v. *Classic*, 313 U. S. 299, 326 (1941)). The public defender's obligations to his client in no way derived from the state's appointment. "Except for the source of payment, their relationship became identical to that existing between any other lawyer and client." *Id.*, at 318.

The *Dodson* Court dealt with an attack on the representation provided by the public defender. *Id.*, at 314. As the attack occurred at this highest level of generalization, the *Dodson* Court dealt with the most basic function performed by the public defender. The *Dodson* Court could not find that all of the public defender's representation constituted state action. Making everything a public defender does in his role as counselor is contrary to the nature of his duties as "personal counselor and advocate." See *id.*, at 318-319.

This does not, however, prevent more specific acts of defense counsel from being state action. Summarily calling any action of defense counsel private exalts form over function. As the *Edmonson* decision demonstrates, a court must look to what the alleged wrongdoer is doing, as well as who that person is.

The key to applying *Dodson* is to distinguish between a person's employment relationship with the government and what the person actually does. The *Edmonson* Court understood that this was the essence of *Dodson*. *Edmonson* noted the different roles played by civil and criminal defense attorneys. While defense counsel's role was to oppose the government "an adversarial relationship does not exist between the government and a private litigant." *Edmonson*, 114 L. Ed. 2d, at 677, 111 S. Ct., at 2086.

The crucial factor behind the distinction was what private counsel did in *Edmonson*. "The selection of jurors represents a unique government function delegated to private litigants by the government and attributable to the government for the purposes of invoking constitutional protections against discrimination by reason of race." 114 L. Ed. 2d, at 677, 111 S. Ct., at 2086. This is what the *Dodson* court meant by looking to what the actor does instead of what he is. It is the actor's "function within the state system, not the precise terms of his employment, that determines whether his actions can be fairly attributed to the State." *West* v. *Akins*, 487 U. S. 42, 55-56 (1988).

The same reasoning that found private counsel to be a state actor in *Edmonson*, and made the representation by a public defender private acts in *Dodson*, mandates a finding of state action in the present case. The difference between *Dodson* and the present case is that different functions of counsel are examined in each case. The plaintiff in *Dodson* attempted to attribute the entirety of his public defender's representation to the state. Yet the state cannot interfere with the vast bulk of this attorney-client relationship. "Indeed, an indispensable element of the effective performance of his [defense counsel's] responsibilities is the ability to act independently of the Government and oppose it in adversary litigation." *Ferri* v. *Ackerman*, 444 U. S. 193, 204 (1979). The government is both constitutionally required to provide the indigent criminal defendant with counsel, *Gideon* v. *Wainwright*, 372 U. S. 335, 344-345 (1963), and prevented from interfering with the attorney-client relationship in criminal cases, see, *e.g.*, *Massiah* v. *United States*, 377 U. S. 201, 205-206 (1964). Finding state action in *Dodson* would put government in a Catch-22 situation. It would have to pay for counsel's mistakes even though it exercised no control over his actions. This runs contrary to the principles behind vicarious liability, see *General Building Contractors* v. *Pennsylvania*, 458 U. S. 375, 392 (1982), and thus was properly rejected in *Dodson*.

The present case deals with a much narrower activity. Only counsel's peremptory challenges are subject to scrutiny. Furthermore, unlike *Dodson*, only the person doing the wrong, the defense, will suffer the consequences, a denied peremptory challenge. The *Edmonson* Court best summed up the difference between the two circumstances:

> "Here, as in most civil cases, the initial decision whether to sue at all, the selection of counsel, and any number of ensuing tactical choices in the course of discovery and trial may be without the requisite governmental character to be deemed state action. That cannot be said of the exercise of peremptory challenges, however; *when private litigants participate in the selection of jurors, they serve an important function within the government and act with its substantial assistance*." 114 L. Ed. 2d, at 678, 111 S. Ct., at 2086-2087 (emphasis added).

Thus defense peremptories may be limited while still preserving *Dodson*. The relationship between defense counsel and client and the tactical decisions that the attorney makes during the representation are still private rather than state action. Only the peremptory challenge, because of its special relationship with government, will be subject to constitutional scrutiny.

D. Section 243.

Federal civil rights law also supports applying *Batson* to the defense. 18 U. S. C. § 243 makes it a crime for "whoever, being an officer or other person charged with any duty in the selection or summoning of jurors" to exclude or fail to summon a citizen for jury service because of the citizen's race. The statute is sweeping in scope, embracing the entire process of jury selection and every actor in it. It covers *any* person charged with *any* duty in the process.

Defense counsel are well within the statute. They are charged with a duty to conduct *voir dire* and jury selection in the interests of their clients. See ABA Model Rules of Professional Conduct Rule 1.3 comment ¶ 1 (1983) ("zeal in advocacy"); ABA Model Code of Professional Responsibility DR 7-

101 (1980); C. Wolfram, *Modern Legal Ethics* 578-579 (1986). Section 243, however, limits this function. If an attorney excludes any citizen on account of race, that attorney has violated the statute.

This Court has relied on this statute to extend protection against jury discrimination when defendant and the excluded juror are of the same race, see *Peters* v. *Kiff*, 407 U. S. 493, 507 (1972) (White, J., concurring); *Powers* v. *Ohio*, 113 L. Ed. 2d 411, 423-424, 111 S. Ct. 1364, 1369 (1991) and against jury discrimination in civil cases, see *Edmonson*, *supra*, 114 L. Ed. 2d, at 680, 111 S. Ct., at 2088. In *Peters*, the concurrence felt that the statute alone was enough to justify allowing a white defendant to challenge the exclusion of blacks from the jury system. *Peters*, *supra*, 407 U. S., 506-507 (White, J., concurring). This reasoning could just as easily extend the statutory prohibition against discriminatory peremptories to a private person. The constitutionality of congressional prohibition of private discrimination is well established. See, *e.g.*, *Runyon* v. *McCrary*, 427 U. S. 160, 179 (1976).

The *Edmonson* decision is similarly illuminating with regards to the importance of § 243.

> "Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal. See *Thiel* v. *Southern Pacific Co.*, 328 U. S., at 220, 90 L. Ed. 2d 1181, 66 S. Ct. 984, 166 A. L. R. 1412. Congress has so mandated by prohibiting various discriminatory acts in the context of both civil and criminal trials. See 18 U. S. C. § 243; 28 U. S. C. §§ 1861, 1862. The Constitution demands nothing less. We conclude that courts must entertain a challenge to a private litigant's racially discriminatory use of peremptory challenges in a civil trial." 114 L. Ed. 2d, at 680, 111 S. Ct., at 2088.

If defense counsel use peremptories to exclude jurors for racial reasons, they are committing a federal crime. The prosecution should be allowed to stop them before they violate section 243.

E. Third Party Standing.

A party usually may raise only his own claims. *Singleton* v. *Wulff*, 428 U. S. 106, 113 (1976). Third party standing is allowed, however, under the proper circumstances. *Powers* v. *Ohio*, 113 L. Ed. 2d 411, 111 S. Ct. 1364 (1991) and *Edmonson* v. *Leesville Concrete Co.*, 114 L. Ed. 2d 660, 111 S. Ct. 2077 (1991) leave no doubt that the prosecution can raise a juror's equal protection claim in the present case. In each case, this Court found that opposing counsel could raise the equal protection claim on behalf of excluded jurors. In *Powers*, this Court noted that third party standing ordinarily was not allowed, but that it will be granted where: 1) the litigant suffers actual injury giving him a sufficient interest in the outcome of the dispute, 2) "the litigant [must have] a close relation to the third party," and 3) "there must exist some hinderance to the third party's ability to protect his or her own interests." *Powers*, *supra*, 113 L. Ed. 2d, at 425, 111 S. Ct., at 1370-371. This test was adopted in *Edmonson*, 114 L. Ed. 2d, at 679, 111 S. Ct., at 2087. In each case, third party standing was granted. *Powers*, *supra*, 113 L. Ed. 2d, at 428, 111 S. Ct., at 1373; *Edmonson*, *supra*, 114 L. Ed. 2d, at 680, 111 S. Ct., at 2088.

In *Powers*, this Court engaged in a lengthy examination of all three factors before finding third party standing. 113 L. Ed. 2d, at 425-428, 111 S. Ct., at 1370-1373. The *Edmonson* Court required much less effort to find third party standing. It found the second and third parts of the test were satisfied in the same way as in *Powers*. In each case, the excluded juror faces substantial barriers to enforcing his rights through civil action. 114 L. Ed. 2d, at 679, 111 S. Ct., at 2087. The same argument applied to the relationship between the excluded juror and the party. The fact that one case was civil and the other was criminal was irrelevant to the close relationship between the party and juror. 114 L. Ed. 2d, at 679, 111 S. Ct., at 2087.

The present case satisfies the second and third parts as readily as did *Powers* and *Edmonson*. The fact that it was the criminal defense that excluded a juror is irrelevant to the difficulty an individual juror has in securing vindication. Similarly,

the prosecution develops just as close a relationship to the excluded juror as did the defense in *Powers* and the civil party in *Edmonson*. The fact that the prosecution is bringing the claim simply does not matter.

The *Edmonson* Court spent a little more time on the first part, whether the litigant was injured enough to warrant raising the third party claim. It decided that a civil litigant's interest in the justice of the verdict and the integrity of the system gives the civil litigant sufficient interest to pursue the excluded juror's claim. 114 L. Ed. 2d, at 679-680, 111 S. Ct., at 2087-2088.

The interests of the prosecution in the justice of verdicts and the integrity of the system are even greater than those of the civil litigants in *Edmonson*. Verdicts tainted by jury discrimination call into question the integrity and justice of the judicial system. *Batson*, *supra*, 476 U. S., at 87; *Rose* v. *Mitchell*, 443 U. S. 545, 556 (1979). This calls into question " '[t]he most basic function of any government': 'to provide for the security of the individual and his property.' " *Illinois* v. *Gates*, 462 U. S. 213, 237 (1983) (quoting *Miranda* v. *Arizona*, 384 U. S. 436, 539 (1966) (White, J., dissenting)). The effect of this loss of respect for the system can be catastrophic, as the city of Miami learned after the McDuffie case.[7] The prosecution's interest in preserving the integrity of the system is thus paramount, satisfying the first part of the *Powers* test. As the prosecution therefore has third party standing, and as state action is present, there is no barrier to preventing the defense from using discriminatory peremptory challenges.

III. Defendants' interest in peremptory challenges do not justify immunizing them from *Batson*.

Every litigant wants peremptory challenges, and no litigant wants to be constrained while exercising them. Peremptories

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7. See part I, B, 2, *ante*, at 13.

free the definition of bias from the narrow definition of cause given in most jurisdictions. Furthermore, it allows counsel to conduct more effective *voir dire*. If counsel is worried that he has offended a juror by probing too much on *voir dire*, he can cure this by peremptorily challenging the offended juror. See *Swain* v. *Alabama*, 380 U. S. 202, 219 (1965); 4 W. Blackstone, *Commentaries in the Laws of England* 346-347 (1st ed. 1769).

For all its utility, there is nothing sacred about the peremptory challenge. It is well-settled that the Constitution does not guarantee a criminal defendant peremptory challenges; any entitlement to a peremptory comes through a grant from the State. *Stilson* v. *United States*, 250 U. S. 583, 586 (1919); *Batson* v. *Kentucky*, 476 U. S. 79, 91 (1986). Whatever utility peremptories have, they are subject to the demands of the Equal Protection Clause. *Powers* v. *Ohio*, 113 L. Ed. 2d 411, 424, 111 S. Ct. 1364, 1369 (1991).

There are three ways to attack subjecting defense peremptories to *Batson*. One method is the Sixth Amendment's impartial jury guarantee. Cf. *Stilson*, *supra*, 250 U. S., at 586. But under the Sixth Amendment a "trial by an *impartial* jury is all that is secured." *Id.* (emphasis added). This Court has not found that the Sixth Amendment's impartiality requirement compels peremptory challenges. See *Holland* v. *Illinois*, 107 L. Ed. 2d 905, 917-918, 110 S. Ct. 803, 808-809 (1990).

The second avenue is due process. Cloaking the peremptory challenge in the Due Process Clause to remove it from *Batson* runs contrary to this Court's due process jurisprudence, and could upset limits on defense peremptories imposed by several states.

It is true that peremptory challenges on behalf of defendant have a long history, stretching back to early common law. See *Swain*, *supra*, 380 U. S., at 212-216. Due process does not, however, lock us into the common law. While adherence to common law procedures may be sufficient to satisfy due process, it is not always necessary to follow the common law. See *Holland*, *supra*, 107 L. Ed. 2d, at 917-918, n. 1, 110 S. Ct., at 808; *Hurtado* v. *California*, 110 U. S. 516, 528-529 (1884).

As the peremptory challenge has never before been considered a constitutional guarantee, and as the Equal Protection Clause already mandates limiting defense peremptories,[8] there is no reason to use due process to shield defendant from *Batson*. Since justice is due the accuser as well as the accused,[9] it is contrary to all notion of due process to use it to give defendant an unfair advantage over the prosecution in molding the jury.[10]

Finally, several states have used their own constitutions to eliminate race-based defense peremptories. See, *e.g.*, *Commonwealth* v. *Soares*, 387 N. E. 2d 499, 517, n. 35 (Mass. 1979); *State* v. *Neil*, 457 So. 2d 481, 487 (Fla. 1984); *People* v. *Wheeler*, 583 P. 2d 748, 765, n. 29 (Cal. 1978); *People* v. *Kern*, 554 N. E. 2d 1235 (N.Y. 1990). These decisions would be upset by any use of due process or the Sixth Amendment to shield defendants from *Batson*. Any state constitutional limit on defendants would be overridden by this Court's interpretation of the federal Constitution.

The last argument to be raised against subjecting defendants to *Batson* will be the nemesis of constitutional law—practicality. When the Constitution demands this Court to decide in a certain way, it must do so, regardless of any policy implications. Here the Equal Protection Clause and 18 U. S. C. § 243 mandate that defendant not exercise racially-biased peremptory challenges—whether this will doom peremptory challenges or whether peremptory challenges are worth saving is irrelevant to this question. Any policy favoring defense peremptories has no constitutional standing.

Even so, California's experience demonstrates that limiting defendants' peremptories will not destroy them. In *People* v. *Wheeler*, *supra*, the California Supreme Court recognized that defense peremptory challenges pose a threat similar to those of the prosecution and therefore indicated that the defense would be held to the same standard as the prosecution in making peremptory challenges. 583 P. 2d, at 765, n. 29; see also *People* v. *Snow*, 746 P. 2d 452, 459 (Cal. 1987) (Eagleson, J., concurring). This holding did not doom defense peremptories.

In the thirteen years since *Wheeler*, objections by the prosecution have not been a substantial source of litigation. *People* v. *Pagel*, 232 Cal. Rptr. 104 (Cal. App. Supp. 1986), cert. denied, 481 U. S. 1028, appears to be the only reported case. Where the objection is needed, however, as in *Pagel*, the Howard Beach case, or the McDuffie case,[11] it is extremely important that it be available.

CONCLUSION

The judgment of the Georgia Supreme Court should be reversed.

Dated: December, 1991

Respectfully submitted,

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8. See part I, *ante*, at 3-4.

9. See *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (1934).

10. See part I, A, *ante*, at 4-6.

11. See part I, B, 2 *supra*, at 13.